Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

ADRIENNE DOWLING,

Petitioner,

vs.

ATLANTA CITY SCHOOL DISTRICT; JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D. F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, In Their Personal and Official Capacity; LESTER W. BUTTS, Superintendent, In His Personal and Official Capacity; and MYRTICE TAYLOR, Associate Superintendent for Instruction, In Her Personal and Official Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an "adequate state remedy" will categorically bar a tenured employee's action against a public school board under 42 U.S.C.A. § 1983 for a deprivation of property without due process of law in violation of the Fourteenth Amendment, where pretermination due process is feasible and state law gives the school board the exclusive power to provide due process, but the school board repeatedly refuses to effectuate due process either before or for 18 months after the termination.

2. Whether a state remedy limited to reinstatement with back pay, awarded 18 months after a state employee's termination, is adequate to protect the employee's right to procedural due process, where the employer has repeatedly refused to provide due process either before or after the termination.

3. Whether a state actor violates a tenured employee's substantive due process rights under the Fourteenth Amendment by terminating the employee, when a hearing has established that it has inadequate grounds for her termination.

PARTIES TO THE PROCEEDING

Petitioner, Adrienne Dowling, is an individual residing in Atlanta, Georgia. She was the Plaintiff in the lower court proceedings of this case and was the Respondent before the Supreme Court of Georgia.

Respondent, Atlanta City School District, is an independent state body created by the Constitution of the State of Georgia (1983). It was a Defendant in the lower court proceedings in this case and was a Petitioner before the Supreme Court of Georgia.

Respondents, Joseph G. Martin, Jr., Preston W. Williams, Midge Sweet, D. F. Glover, John F. Elger, Robert Waymer, Mary Anne Bellinger, Ina Evans, and Carolyn Yancey, are individuals who comprised the Atlanta Board of Education and were residents of Atlanta, Georgia. They were Defendants in the lower court proceedings and were Petitioners before the Supreme Court of Georgia.

Respondent Lester W. Butts, an individual, was the Superintendent of the Atlanta City School District. He was a Defendant in the lower court proceedings in this case and was a Petitioner before the Supreme Court of Georgia.

Respondent Myrtice Taylor, an individual, was the Associate Superintendent for Instruction of the Atlanta City School District. She was a Defendant in the lower court proceedings in this case and was a Petitioner before the Supreme Court of Georgia.

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OPINIONS BELOW

On February 12, 1996, the Supreme Court of Georgia issued its opinion, reversing the decision of the Georgia Court of Appeals and affirming the trial court's dismissal of the action. The official citation for the opinion below is *Atlanta City School District v. Dowling*, 266 Ga. 117 (1996).

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the Supreme Court of Georgia and its judgment of February 12, 1996, affirming the dismissal of this action by the trial court, the Superior Court of Fulton County (Georgia). Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a). The Supreme Court of Georgia is the state's highest court.

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Synopsis.

In April, 1992, Respondent Atlanta Public School District announced its intention to fire Petitioner Dowling effective June 30. Dowling had tenure, and state law gave the School District the exclusive power and duty to provide her due process to her. On June 30, although it had not attempted to hold a hearing in the preceding two months, it fired her. She filed suit in state court, citing *inter alia* 42 U.S.C. § 1983, and the court ordered the School District to continue her salary until it held a fair hearing. An independent hearing body then heard the case and held that the School District had no cause to terminate Dowling.

A few days later, the School Board fired Dowling anyway, without reviewing the evidence presented at the hearing. It then refused to forward her administrative appeal to the State Board of Education. When the court forced the School District to forward the appeal, the State Board found the termination "arbitrary and capricious". The School Board still refused to reinstate her. Finally, 18 months after her termination, the court ordered Dowling's reinstatement with back pay.

The Supreme Court of Georgia held that Dowling's reinstatement with back pay was an "adequate state remedy" which categorically barred her from pursuing her action for damages and attorneys' fees under § 1983. In

its decision, it failed to discuss this Court's holding in *Zinermon v. Burch*, 494 U.S. 113 (1990), which held that an adequate state remedy would not bar an action under § 1983 if the deprivation without due process was accomplished by a state actor which was authorized under state law to effectuate the deprivation and was responsible, under state law, to provide due process.

In the Petition below Dowling argues: 1) The School Board's repeated refusals to effectuate procedural due process were an abuse of the power assigned to them by state law, and an adequate state remedy will thus not bar a suit under § 1983; 2) In any case, the state remedy was not adequate to protect her Constitutional rights; and 3) By firing Dowling after a hearing established that it had no right to fire her, the Atlanta Schools deprived Dowling of substantive due process.

B. Statement of the Case.

Petitioner, Mrs. Adrienne Dowling, was the general manager of Atlanta's public broadcast stations (WABE radio and WPBA television). Respondent, Atlanta City School District, holds the license for these stations and was therefore Dowling's employer. It granted her "tenure" in 1990; the court below held that Dowling's contract raised an expectation of continued employment under Georgia law sufficient to give her a property interest in her job. This holding was not appealed and is thus undisputed.

In 1991, the relationship between Dowling and the School Board soured. Dowling claimed this problem resulted from her refusal to allow members of the School

Board and their political cronies to line their pockets with station funds and otherwise abuse the stations for their personal benefit. Respondent Lester Butts, the Superintendent of the Atlanta City School District, alleged that these problems stemmed entirely from Dowling's performance deficiencies. (R II 8-9, 73-74)

In a letter dated April 13, 1992, Superintendent Butts proposed to terminate Dowling's employment effective June 30, 1992, and admitted she had a right to a hearing prior to termination. On June 30, however, the School District terminated Dowling's employment without giving her a hearing of any sort during the intervening two months. (R II 88-90, 101-02 (#20)) The initial hearing was first scheduled for July 15, 1992, before the Georgia Professional Practices Commission (hereinafter the "PPC").[1] The hearing was continued because the PPC (acting as the School District's agent) failed to provide a disinterested hearing officer.[2] (R II 90-91, 102-103 (## 20-24)) The School District did pay Dowling's salary from June 30 to July 15.

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[1] Under Georgia law, the members of a board of education themselves have the power and duty to constitute the tribunal in a case such as this one. The Atlanta Board requested that the PPC hear the case in their stead, which suited Dowling and is thus not at issue.

[2] The Respondents apparently contest Dowling's attribution of this failure to them. This is a question of disputed fact which must be resolved in Dowling's favor at this point, i.e. in resolving a motion to dismiss. At any rate, the hearing was constitutionally inadequate and would have been continued anyway; a later hearing officer found that the notice given to Dowling was inadequate to allow her to make a defense, and continued the procedure a second time.

On August 4, 1992, the School District informed Dowling that she had no right to any due process at all; while it might proceed with a hearing rescheduled in September, it would not consider itself bound by the result. (R II 137) Dowling then filed suit in the Superior Court of Fulton County, seeking to require the School District to reinstate her and to grant her due process prior to terminating her.

On August 19, the superior court issued an order finding that Dowling had a property interest in her employment and restraining the Atlanta Schools from discontinuing Dowling's salary until they had complied with the due process specified in the contract. (R I 63) The court, however, refused to reinstate her pending a hearing and decision.

The due process hearing was recommenced on September 14. The new hearing officer, however, once again continued the hearing, finding that the School District had not given Dowling sufficient notice of the charges against her. (R II 147-54) The hearing was finally held before a three-person PPC tribunal on October 4, 5, and 8, 1992. On October 27, the PPC tribunal held, unanimously, that the School District did not have sufficient cause to fire Dowling.

On November 9, 1992, the School Board voted to fire Dowling, despite the PPC's decision that it did not have grounds to do so. No member of the School Board had attended the hearing. In fact, the Board had not even had a full transcript of the hearing prepared and could not have reviewed the evidence independently. (R I 194, 229-30)

On November 20, Dowling filed an appeal to the State Board of Education with Superintendent Butts, as provided by her contract and state administrative procedures. (R II 188) Butts then had the ministerial obligation, under Georgia law, to forward the appeal to the State Board. (R I 157, 193) Butts, however, refused to transmit the appeal. Dowling returned to court. On her motion, the superior court held Butts and the School District in contempt of its restraining order for refusing to transmit the appeal, but again refused to reinstate Dowling until the administrative process was complete.[3] (R I 292) Butts then transmitted the appeal to the State Board, four months late.

On July 8, 1993, the State Board of Education considered Dowling's appeal and held in her favor, finding that the discharge was "arbitrary and capricious". (R II 218) Nevertheless, the School District continued its refusal to return Dowling to work, or to pay her salary. The superior court, although granting Dowling summary judgment on the issue of liability, declined to compel Dowling's reinstatement. (A14-A17.) Dowling then had to bring further motions in court, including an evidentiary hearing, before the Defendants would reinstate her (January 3, 1994) or pay her back pay (January 27, 1994). (R II 238, 276, 284, 390)

Dowling, whose original complaint had pleaded a cause of action under 42 U.S.C. § 1983, attempted to bring

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[3] The School District appealed the contempt order to the Supreme Court of Georgia, which affirmed it. *Atlanta City School District v. Dowling*, Georgia Supreme Court Case No. S93A1330 (November 4, 1993). (R II 3)

the case to trial before the superior court, seeking damages and attorneys' fees for the School District's repeated and malicious refusals to afford her procedural due process over the previous one and one-half years. On April 1, 1994, the superior court dismissed the complaint, holding that Dowling's eventual reinstatement with back pay constituted an "adequate state remedy" which fully compensated her for the Constitutional deprivation of due process. (A12-A13.)

As of that time, Dowling's attorneys' fees had run to roughly $107,000. On July 11, 1994, the trial court awarded Dowling about $28,000, the amount compensable under state law for abusive litigation (O.C.G.A. § 9-15-14) but less than Dowling was due under 42 U.S.C. § 1988 (contested fact). (Supplemental Record.)

Many of the facts stated herein are apparently disputed by the Respondents, particularly the questions of whether they provided Dowling with a foreshortened hearing prior to her first (June 30) termination and whether the failure to provide early hearings were their fault or Dowling's. The case comes before this Court, however, on the superior court's grant of the Respondents' motion to dismiss, and was decided as a question of law. Under these circumstances, both federal and Georgia practice dictate that the plaintiff's allegations of fact will be taken as true. *E.g., Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974); *Frady v. Irvin*, 245 Ga. 307, 176 S.E.2d 866 (1980). Moreover, the facts underlying the later violations of due process are uncontested, such as the School District's refusal to implement the PPC decision in Dowling's favor and the illegality of its refusal to transmit her appeal to the State Board of Education.

Statement Pursuant to Supreme Court Rule 14(1)(g)(i)

The Constitutional question was initially raised in the original Complaint to the Superior Court of Fulton County (August 18, 1992), ¶ 31:

> The Schools' dismissal of Dowling without a hearing violates U.S.C.A. §§ 1983 and the fourteenth amendment of the Constitution of the United States.

The Fulton County Superior Court considered and dismissed this count of the Complaint in its Final Order of April 1, 1994. (A13.) Dowling appealed the dismissal, on the grounds that it violated the Fourteenth Amendment, to the Georgia Court of Appeals, which, acting as a Whole Court (i.e. en banc) found in her favor and reversed by order dated March 16, 1995. (A6-A11.) The Supreme Court of Georgia considered the Constitutional issue and reversed the Court of Appeals, reinstating the Superior Court's dismissal, in the Order of February 12, 1996. (A1-A5.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW, HOLDING THAT THE EXISTENCE OF AN ADEQUATE STATE REMEDY CATEGORICALLY BARS AN ACTION UNDER § 1983, DIRECTLY CONTRADICTS A PRIOR DECISION OF THIS COURT.

In *Parratt v. Taylor*, 451 U.S. 527 (1981) (as modified in *Daniels v. Williams*, 474 U.S. 327 (1986)), and *Hudson v. Palmer*, 468 U.S. 517, 531-32 (1984), this Court carved out

an exception to the general rule that a state employer is liable under § 1983 for failing to provide a hearing prior to depriving a person of property. If the state's action is negligent, or is a "random, unauthorized" act performed by a lower-level employee, it is not possible for the state to provide a predeprivation hearing. It "borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct." *Parratt*, 451 U.S. at 541.

In 1990, this Court generally limited the exceptions stated in *Parratt* and *Hudson*:

> [Parratt and Hudson] do not stand for the proposition that in every case where a deprivation is caused by an 'unauthorized' departure from established practices, State officials can escape § 1983 liability simply because the State provides tort remedies. This reading of *Parratt* and *Hudson* detaches those cases from their proper role as special applications of the settled principles expressed in *Monroe* and *Matthews*.

Zinermon v. Burch, 494 U.S. 113, 138 n.20 (1990).

In the decision below, the Georgia Supreme Court completely failed to address the underlying rationale of this Court's decisions in *Parratt* and *Hudson*. Finding that Dowling had been reinstated with back pay, it held that she was catergorically barred from bringing an action under § 1983: "We hold that the state provided a constitutionally adequate remedy that bars Dowling from maintaining her damages action under section 1983." (A1.) In so holding, it directly contradicted the express holding of this Court in *Zinermon v. Burch*:

> In *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes. . . . Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. . . . [I]n many cases there is 'no quarrel with the state laws on the books'; instead, the problem is the way those laws are or are not implemented by state officials.
>
> * * *
>
> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.

Zinermon, 494 U.S. at 124-25 (internal citations omitted), 132. Here, there is no question that predeprivation due process was feasible, since the School District proposed the termination in April and did not effectuate it until June 30, over two months later.

This Court's holding in *Zinermon v. Burch, supra*, applied two main factors in determining a state official's authority to commit a deprivation of procedural due process:

> [P]etitioners cannot characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to

> initiate the procedural safeguards set up by state law to guard against unlawful confinement. . . .

494 U.S. at 138.

The Atlanta School District meets both factors. As to the first factor – delegation of authority to commit the deprivation – the Atlanta School District is a creature of the Georgia Constitution and is not subordinate to any other state body. An elected Board of Education has "complete control and management" of the schools within its jurisdiction, including the right to fire employees. Constitution of the State of Georgia, Article 8, § 5; *Patterson v. Boyd*, 211 Ga. 679 (1955).

As to the second factor – a "delegated . . . concomitant duty to initiate the safeguards set up by state law" – Georgia statutes give the Atlanta School District exclusive power and responsibility to provide adequate due process, both in the case of a tenured teacher's discharge, O.C.G.A. § 20-2-940, 942, and in the case of a tenured employee otherwise unprotected, O.C.G.A. § 20-2-1160.[4]

In the case of a hearing held under O.C.G.A. § 20-2-1160, such as Dowling's, the state does not even prescribe the type of notice to be given, the time within which the hearing shall be held, the persons before whom it is to be held, or any other guarantees of fairness. The School Board may use whatever procedure it invents, and

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[4] O.C.G.A. § 20-2-1160 was ultimately held to be the jurisdictional statute underlying Dowling's administrative procedure.

the State Board of Education has held that it is without power to reverse a decision because of procedural unfairness. (R II 228-231) Also, the School District (acting through its Superintendent) has the exclusive power and duty to forward an appeal of its decision to the State Board of Education. Its power and duty is exemplified by the facts of this case. When the School District refused to forward Dowling's appeal, no superior executive power could order it to do so; her only remedy was judicial.

One could not create a case in which a state actor's deprivation of due process was more "authorized" than this. The Atlanta School Board terminated Dowling by an official vote, under the power granted to it by statute, and without providing the due process that state law gave it the exclusive power to provide.

II.

THE DECISIONS OF STATE COURTS AND CIRCUIT COURTS OF APPEALS CONFLICT ON THE ISSUE OF WHETHER AN ADEQUATE STATE REMEDY, IN AND OF ITSELF, IS SUFFICIENT TO BAR A SUIT UNDER § 1983.

Roughly half of the state appellate courts which have considered the question have allowed a plaintiff to state a claim under § 1983 unless the deprivation of due process was "random and unauthorized", and predeprivation due process was "unfeasible", regardless of the availability of a state remedy. Typical of these cases is *Kellogg v. City of Gary*, 562 N.E.2d 685, 701 (Ind. 1990):

> Since there is nothing to suggest that a predeprivation hearing was clearly not feasible, the existence of an available state remedy does not

> preclude the citizens from pursuing a procedural due process claim under § 1983.

Other states which have adopted this approach, with or without such a clear statement of their holding, include: *Owens v. City of Phoenix*, 884 P.2d 1100, 1107 (Ariz. App. 1994) ("the adequacy of such a postdeprivation remedy is not a bar to a procedural due process claim where a predeprivation hearing is feasible and the deprivation is not a random, unauthorized act"); *Brosterhous v. State Bar of California*, 906 P.2d 1242, 1249 (Cal. 1995) ("the availability of a state remedy does not displace a section 1983 action"); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991) ("[t]he existence of an adequate state remedy was irrelevant" to a § 1983 claim where predeprivation due process is not "impossible or impracticable"); *Kristensen v. Strinden*, 343 N.W.2d 67 (N.D. 1983) (allowing § 1983 suit on grounds of public policy). *Cf. Knight v. City of Missoula*, 827 P.2d 1270, 1274 (Mont. 1992) (negligence case); *Irby v. Macht*, 522 N.W.2d 9 (Wis. 1994); *Cooperman v. University Surgical Associates, Inc.*, 513 N.E.2d 288, 291, 298 (Ohio 1987) (defendants' actions not "within the scope of their . . . responsibilities"); *Wilhelm v. Gray*, 766 P.2d 1357, 1360 (Okl. 1988) (negligence case).

State cases which have gone the other way, like the present case, generally do not discuss the feasibility of a predeprivation hearing; rather, as in the present case, the opinions simply sidestep the issue. Typical of these cases is *Anselma Station Ltd. v. Pennoni Associates, Inc.*, 654 A.2d 608, 612 (Pa. Cmwlth. 1995), which states flatly that

> an individual is not denied predeprivation due process if a state provides means by which he can receive redress for the deprivation. A post-

> deprivation hearing is adequate to provide such redress.

See Roberts v. Joiner, 590 So.2d 195 (Ala. 1991) (termination by town council); *Dauchenhausen v. Croson*, 585 N.Y.S.2d 281, 286 (Sup. 1992); *Temple v. Marlborough Division of District Court*, 479 N.E.2d 137 (Mass. 1985); *City of Lake Worth v. Walton*, 462 So.2d 1137, 1140 (Fla. App. 4 Dist. 1984); *cf. Myers v. Adams*, 728 S.W.2d 771, 772 (Tex. 1987) (negligence case, but in dicta states that "assuming that the wrongful conduct" were intentional, the existence of adequate state remedies would foreclose a § 1983 claim); *Schroeder v. Morton Grove Police Pension Board*, 579 N.E.2d 997 (Ill.App. 1991) (dicta); *Lindenman v. Umscheid*, 875 P.2d 964, 976 (Kan. 1994).

The same split occurs among the various U.S. Courts of Appeals. The First, Second, and Seventh Circuits would have ruled for the Atlanta School District; the Sixth and Eighth, for Dowling.

The First Circuit Court of Appeals has repeatedly held that an adequate state law remedy will defeat a § 1983 claim, without examining the feasibility of predeprivation due process or whether the failure to provide predeprivation due process was "random or unauthorized":

> [g]iven an adequate state-law remedy for a procedural due process claim, no § 1983 claim lies.

Reid v. State of New Hampshire, 56 F.3d 332, 336 n.8 (CA1 1995). *See Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (CA1 1994); *Rumford Pharmacy v. City of East Providence*, 970 F.2d 996, 999 (CA1 1992) (failure to allege inadequacy of state remedies warrants dismissal of a § 1983 claim).

The Second and Seventh Circuits have adopted a test only slightly more lenient. In *Easter House v. Felder*, 910 F.2d 1387 (CA7 1990) (en banc), the Seventh Circuit stated that a § 1983 remedy would lie only where the state legislature had failed to provide an administrative procedure or where the state legislature knew that state officials were likely to disregard the procedure in place. In *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (CA7 1991), it again stated that § 1983 procedural due process cases would be limited to actions where the failure to provide a hearing was an "established state procedure." The Second Circuit has adopted a similar rule, albeit without the same degree of analysis. *E.g., Katz v. Klehammer*, 902 F.2d 204 (CA2 1990).

The Sixth Circuit and Eighth Circuits have reached the opposite conclusion. In *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (CA6 1992), the school board had provided an adequate pretermination hearing. 958 F.2d at 1349. Although state law provided for an administrative appeal, the school board obstructed the plaintiffs from obtaining their appeals. Under these circumstances, heeding this Court's holding in *Zinermon v. Burch*, the Circuit allowed a § 1983 claim to proceed, on the grounds that the local board had abused its power under state law to provide due process, even though state law provided for an administrative remedy. The Eighth Circuit has also allowed a § 1983 action, where procedural due process was denied by a local board of education. *Moore v. Warwick Public School District No. 29*, 794 F.2d 322 (CA8 1986).

III.

THE DECISION OF THE COURT BELOW, HOLDING THAT THE STATE REMEDY IS ADEQUATE TO PROTECT DOWLING'S CONSTITUTIONAL INTERESTS, DIRECTLY CONTRADICTS A PRIOR DECISION OF THIS COURT.

A. Georgia Does Not Provide a Tort Remedy.

This Court stated in *Zinermon v. Burch* that the exceptions to *Parratt* and *Hudson* would not apply to every case where the action was unauthorized *and* the state supplied a "tort remedy". 494 U.S. at 138, n.20 (1990). Here, the state has not supplied a tort remedy. The Georgia law of sovereign immunity precludes Dowling from seeking compensatory or punitive damages under state tort law.[5] O.C.G.A. § 20-2-992; *e.g., Truelove v. Wilson*, 159 Ga. App. 906 (1981).

The present case constitutes a good vehicle for giving the guidance on this important and recurring issue of law under the Due Process Clause. Dowling asserts that, in order to be "adequate", a state remedy must *at least* compensate the victim of an unconstitutional property deprivation with such compensatory damages as can be proven to a jury. Dowling's deprivation of due process

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[5] Where the adequacy of a state remedy does come into play, the concept of sovereign immunity has caused this Court great concern. While it has never decided the issue, it has hinted broadly that a state's application of sovereign immunity may render a state remedy for a procedural due process violation "inadequate". For example, in *Hudson*, this Court discussed the problem at length, but did not decide it because Virginia law probably would not apply sovereign immunity to Hudson's case. 468 U.S. at 535-36 and n.15.

for 18 months[6] caused her to suffer direct economic damage: she had to borrow money on her credit cards, at interest rates as high as 18% per annum, in order to pay her bills, and she had to pull her son out of college in Rhode Island.

In addition, she suffered considerable humiliation and physical distress as a result of her highly public firing for alleged incompetence. Finally, she incurred attorneys' fees which, for a woman at her economic level, are enormous.

B. The State of Georgia Did Not Supply Dowling with an Adequate Equitable Remedy.

Even if equitable relief of reinstatement with back pay *were* an "adequate state remedy" in some circumstances, the superior court did not reinstate Dowling pending the provision of due process. Rather, the superior court did not order Dowling's reinstatement until six months after the administrative process concluded in her favor. The end result was that the state, which at no time established a right to deprive Dowling of her employment, deprived her of her property interest for over 18 months. Such a "remedy" eviscerates the basic rule of due process: that a person has a right to due process *prior* to the deprivation, unless it is impossible or impracticable to provide it.

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[6] Dowling did receive two interim back pay awards, totally about seven or eight months of pay, in the early part of her case, pursuant to the TRO issued in August, 1992.

This Court has long held that there can be no right without a remedy. *E.g., Peck v. Jenness,* 48 U.S. (7 How.) 612, 623 (1849). This Court has also held that a tenured employee has a right to a due process before he is terminated. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Thus, because the decision below supplies no remedy for Dowling's temporary (18-month) deprivation of property – neither reinstating Dowling until a predeprivation hearing was held nor allowing her damages for the period of the deprivation – the decision below conflicts with the clear precedent of this Court. Georgia law refusing to enforce the requirement of predeprivation due process is well-established. *E.g., Turner v. Giles,* 264 Ga. 812 (1994) (deprivation of a blind vendor's license).

C. The State of Georgia's Statutes Do Not Require a School Board to Provide Due Process to All Tenured Employees.

Finally, the administrative procedures provided by the State of Georgia are inadequate to ensure due process. Although state law arguably ensures adequate due process to certificated teachers (O.C.G.A. § 20-2-940) and civil service employees (*Narey v. Dean,* 32 F.3d 1521, 1527-28 (CA11 1994)), Dowling was unprotected by either statute. The statute compelling the School District to provide her with due process is O.C.G.A. § 20-2-1160, which

gives unlimited discretion to a local school board in determining what procedure to follow.[7]

State law did not ensure that Dowling received fair hearing. The State Board of Education found that the notice given to Dowling was not specific enough to allow her "fairly to show any error that existed therein", but that, under O.C.G.A. § 20-2-1160, "the Local Board is not required to give [Dowling] *any* notice." (R II 228-30, emphasis added.)

In point of fact, the relief provided to Dowling by the superior court was grounded in the Fourteenth Amendment and § 1983, because the Georgia statute did not apply to her:

> 5.
>
> This Court agrees with the State Board's conclusion that the Plaintiff is not entitled to the protections of the Fair Dismissal Act as a matter of statutory construction. However, 'where no formal system of tenure exists, due process may be mandated nonetheless where state rules or understandings between the parties support a claim of entitlement to continued employment.' *LaPier v. Holliman*, 514 F.Supp. 692 (N.D. Ga., 1980).

(A16.)[8]

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[7] Dowling had due process rights under her employment contract in excess of those supplied by statute, as the contract adopted the procedures of the Fair Dismissal Act.

[8] *LaPier v. Holliman*, although construing state law to determine whether or not the plaintiff had a reasonable expectation of continued employment, did so in the setting of

Although Dowling won her hearing, she still suffered compensable injury from Georgia's facially inadequate procedure, to-wit: 1) a continuation of the hearing date, lengthening her termination by six weeks, and 2) the costs and attorneys' fees generated in attempting to ensure that the hearing was fair under 42 U.S.C. § 1988, which the court refused to award her.

There could be no greater proof of the inadequacy of Georgia's administrative remedies than the court's need to rely on the Fourteenth Amendment as the source of Dowling's procedural due process rights.

IV.

THE ATLANTA SCHOOL DISTRICT'S TERMINATION OF DOWLING, AFTER A HEARING HAD ESTABLISHED THAT IT DID NOT HAVE SUFFICIENT CAUSE, VIOLATED DOWLING'S RIGHT TO SUBSTANTIVE DUE PROCESS.

The Fourteenth Amendment prohibits termination of a tenured employee except for cause. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Roane v. Callisburg Independent School District*, 511 F.2d 633 (CA5 1975). The tendency in recent circuit court decisions has been to limit employee rights under the Fourteenth Amendment to procedural due process rights, on grounds that employment is not a fundamental right. *E.g., McKinney v. Pate*, 20 F.3d 1550 (CA11 1994) (en banc).

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the Fifth and Fourteenth Amendments, specifically citing *Board of Regents v. Roth*, 408 U.S. 564 (1972). 514 F.Supp. at 693-94.

At the time the Atlanta School Board voted to terminate Dowling, the PPC had already issued a report finding inadequate cause for discharge. The School Board then refused to reinstate her (or continue her salary) when the State Board of Education held her discharge to be "arbitrary and capricious", and then again when the superior court granted her summary judgment. In short, Dowling's right to her job was already established when the Atlanta School District fired her.

The main thrust of this petition is the Atlanta School District's violation of Dowling's procedural due process rights. As an alternative ground, however, she asserts that, at some point, a termination will violate substantive due process,[9] and asks the Court to consider the question if this petition is granted.

CONCLUSION

As of today, the protection a person receives from a taking of property without due process of law depends upon where he lives. In some state court systems and at least three federal circuits, a person deprived of property without due process cannot bring suit to enforce his rights if state law forbids the deprivation and provides some sort of relief. In some such jurisdictions – certainly in Georgia – the right to predeprivation due process is illusory. The Georgia courts will neither reinstate an

[9] Dowling presented the issue to the Supreme Court of Georgia, which neither discussed it nor ruled upon it.

employee to her job pending provision of due process, nor allow her damages for the term of the deprivation.

In other state courts and at least two federal circuits, the person deprived can avail himself of the protections of § 1983, as long as predeprivation due process was feasible and the responsible state body knew of the deprivation in advance (or was itself responsible for the breach, as in the present case).

Dowling urges this Honorable Court to grant her petition, in order to bring uniformity in enforcement of the Fourteenth Amendment throughout the nation and to ensure that the nations' courts apply this Court's previous decisions correctly.

Respectfully submitted,

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APPENDIX

In the Supreme Court of Georgia

Decided: FEB 12 1996

S95G1083. ATLANTA CITY SCHOOL DISTRICT et al. v. DOWLING.

FLETCHER, Presiding Justice.

The Atlanta Board of Education terminated Adrienne Dowling's contract as general manager of the school board's public television and radio stations. She sued and the trial court ordered the school board to reinstate her and awarded her full back pay and benefits. The trial court then granted the school board's motion to dismiss Dowling's claim for compensatory and punitive damages under 42 U.S.C. § 1983. The question on appeal is whether Dowling has a claim for damages for a procedural due process violation when she was reinstated in her job with back pay as a result of state remedies. We hold that the state provided a constitutionally adequate remedy that bars Dowling from maintaining her damages action under section 1983.

The Atlanta school superintendent notified Dowling in April 1992 that he would not recommend the renewal of her contract for the 1992-93 school year. In response to Dowling's request for a hearing prior to June 30 when her contract expired, the Atlanta board referred the matter to the Professional Practices Commission of Georgia. On June 30, 1992, Dowling's immediate supervisor instructed Dowling to vacate her office. In August, Dowling filed a lawsuit in state court alleging that the school board had terminated her without due process as provided under the Georgia Fair Dismissal Act, school board policies, and

Georgia and United States Constitutions. In October 1992, the Professional Practices Commission held a three-day hearing and found that the school superintendent did not meet his burden of proof in establishing the charges against Dowling. The Atlanta school board rejected the commission's recommendation and voted not to renew Dowling's contract. Dowling appealed to the State Board of Education, which reversed the Atlanta board's decision to terminate.

Having succeeded in the administrative process, Dowling moved for summary judgment on her due process claims in superior court. The trial court found that the Atlanta board had given Dowling a right to protection under the Fair Dismissal Act, granted Dowling summary judgment on the issue of liability under that act, ordered the Atlanta board to reinstate her as general manager, and awarded her back pay and benefits. Based on these orders, the trial court dismissed Dowling's claim for damages under 42 USC § 1983 for failure to state a claim. The Court of Appeals reversed,[1] and we granted certiorari.

Both the Georgia and Federal Constitutions prohibit the state from depriving "any person of life, liberty, or property, without due process of law."[2] A person may bring suit under 42 U.S.C. § 1983 for state officials' violation of procedural due process. Unlike a substantive due process claim, a constitutional violation of procedural

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[1] *Dowling v. Atlanta City School District*, 216 Ga. App. 688 (455 SE2d 399) (1995).

[2] U.S. Const. amend. 14; Ga. Const. Art. I, Sec. I, Para. I.

due process is not complete "unless and until the State fails to provide due process."[3] As the Eleventh Circuit Court of Appeals explained: "In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise."[4]

We conclude that the Eleventh Circuit's decision in *McKinney v. Pate* is persuasive authority that Dowling is not entitled to maintain a damages claim under section 1983 for a procedural due process violation. In *McKinney*, the court held that there was no due process violation and, therefore, no section 1983 claim when an public employee alleged that he was deprived of his property interest in employment by a biased decision maker at his pre-termination hearing.

> [E]ven if McKinney suffered a procedural *deprivation* at the hands of a biased Board at his termination hearing, he has not suffered a *violation* of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation.[5]

The court concluded that the state provided an available, adequate remedy to address the due process violation through state court review of employment termination

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[3] *Zinermon v. Burch*, 494 U. S. 111 (110 SC 975, 983, 108 LE2d 100) (1990).

[4] *McKinney v. Pate*, 20 F3d 1550, 1557 (11th Cir.), cert. denied, (115 SC 898 130 LE2d 783) (1994).

[5] Id. at 1563.

cases, including the power to order the relief that McKinney sought. In a later case involving a state employee in this state, the federal appeals court found that the Georgia Code provides Georgia courts with the similar power to review employment termination cases for due process violations.[6]

Applying these cases, we hold that Dowling may not maintain a claim for damages for a procedural due process deprivation under section 1983 when the state court review of her termination provided an adequate remedy under state law. Before Dowling was terminated, the Atlanta school board notified her of the charges against her and referred her proposed dismissal to an impartial decision maker for a hearing. When the Atlanta board stopped paying her salary, the trial court issued a temporary restraining order requiring the school board to continue to pay her salary until it held a pre-termination hearing and rendered a final decision. Dowling received a full evidentiary hearing before the Professional Practices Commission, which recommended that the school board vacate the superintendent's decision not to renew Dowling's contract. When the Atlanta board rejected that recommendation and voted to uphold Dowling's dismissal, the trial court again ordered the board to continue to pay Dowling's salary pending her administrative appeal and this court affirmed that order on appeal.[7] On administrative review, the State Board of Education reversed the Atlanta board's decision to dismiss Dowling. Finally, the

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[6] See *Narey v. Dean*, 32 F3d 1521 (11th Cir. 1994).

[7] *Atlanta City School District v. Dowling*, 263 Ga. XXVI (1993) (judgment affirmed without opinion).

trial court granted the equitable relief that Dowling sought; it ordered the Atlanta school board to reinstate Dowling as general manager and awarded her full back pay and benefits.

All these actions were taken as a result of rights granted under either state statutes or local board policies. Because judicial review redressed any procedural due process deprivation that Dowling suffered, the trial court properly dismissed her section 1983 claim for damages for failure to state a claim.[8]

Judgment reversed. All the Justices concur.

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[8] See *Turner v. Giles,* 264 Ga. 812 (450 SE2d 421) (1994) (holding that blind vendor whose state license was terminated without a hearing had no viable section 1983 claim for damages for a procedural due process violation when he was reinstated and awarded back pay following a post-termination evidentiary hearing), cert. denied, (115 SC 1959) (1995); see also *Henderson v. Sherrington,* 189 Ga. App. 498 (376 SE2d 397) (1988) (holding that county employee had no section 1983 cause of action for damages for violation of her procedural due process rights when the available state remedy was adequate, resulting in reinstatement and back pay).

WHOLE COURT

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

March 16, 1995

In the Court of Appeals of Georgia

A94A2185. DOWLING v. ATLANTA CITY SCHOOL DISTRICT et al. P-147

POPE, Presiding Judge.

Plaintiff Dowling, an employee fired by defendants (collectively referred to herein as "the Board") without a pretermination hearing, brought this action pursuant to the Fair Dismissal Act of Georgia (OCGA § 20-2-940 et seq.) as well as the Fourteenth Amendment to the United States Constitution and 42 USCA §§ 1983 & 1988. Although the trial court ruled that plaintiff was not covered by the Fair Dismissal Act, it eventually found that the Board had improperly fired plaintiff without good cause and ordered the Board to reinstate plaintiff with full back pay. Citing *Henderson v. Sherrington*, 189 Ga. App. 498 (2) (376 SE2d 397) (1988), the trial court then dismissed plaintiff's claims for further damages and attorney fees under 42 USCA §§ 1983 & 1988 because reinstatement with back pay was an "adequate remedy." We conclude that *Henderson* was erroneously decided and should be overruled, and therefore reverse.

In April 1992, the Superintendent of the Atlanta Public Schools informed plaintiff, the manager of the school

system's public radio and television stations, that he would recommend that the Board not renew her contract. Although plaintiff was notified of her right to a pretermination hearing and she made a timely request for such a hearing, no pretermination hearing was held and plaintiff was fired on June 30, 1992. The Board initially agreed to give plaintiff a posttermination hearing, but it subsequently informed her that she was not entitled to any hearing at all.

Plaintiff then filed this § 1983 action, seeking and receiving immediate injunctive relief. The trial court ruled that plaintiff had a right to a pretermination hearing on whether the Board had good cause to terminate her employment, and ordered the Board to continue paying plaintiff her salary pending the outcome of the hearing. A hearing was finally held in October 1992, before a panel of the Professional Practices Commission ("PPC"). The panel members unanimously concluded that the Board did *not* have good cause to terminate plaintiff's employment and that plaintiff should be reinstated. Nevertheless, the Board chose to ignore the conclusions of the PPC panel and again voted to fire plaintiff. And, apparently believing it had satisfied the trial court's order by paying plaintiff through the hearing, it again stopped paying her salary.

Plaintiff appealed the local Board's decision to the State Board of Education pursuant to OCGA § 20-2-1160 (b). The State Board ruled in favor of plaintiff in July 1993, finding her termination to be "arbitrary and capricious." Yet the Board *still* refused to reinstate plaintiff, forcing her to bring further motions in the trial court in this case. Indeed, the Board did not reinstate plaintiff

until explicitly ordered to do so by the trial court. Because plaintiff was eventually reinstated, however, the trial court was bound by *Henderson* to hold that plaintiff had been provided an "adequate remedy" and to dismiss her claims for damages and attorney fees.

In *Henderson*, an employee was fired by a county tax commissioner. The employee appealed her termination to the county merit system board, which ruled that she should not have been fired; but the tax commissioner still refused to reinstate the employee. Only when the employee brought a § 1983 action and obtained an order from the trial court was she reinstated with full pay. Yet the trial court then dismissed the plaintiff's claims for damages and attorney fees. We affirmed, relying on *Parratt v. Taylor*, 451 U. S. 527 (101 SC 1908, 68 LE2d 420) (1981)[1] for the proposition that a governmental actor's conduct which deprives a plaintiff of liberty or property can give rise to a procedural due process violation only if "available state remedies are not themselves adequate to provide the claimant with redress for the alleged injury." *Henderson*, 189 Ga. App. at 499. We stated that the plaintiff in *Henderson* clearly had an adequate state remedy since she had been reinstated with full pay – despite the fact that the State administrative remedy had proved ineffective and she was not reinstated until she filed a § 1983 action and obtained a court order. Because the plaintiff's reinstatement with back pay resulted from the § 1983 action itself, rather than from a state remedy, we

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[1] *Parratt* was overruled in part by *Daniels v. Williams*, 474 U. S. 327, 330-331 (106 SC 662, 88 LE2d 662) (1986), but the overruled portion of the decision is not relevant here.

now conclude that Henderson was wrongly decided and must be overruled.

The Board also calls our attention to *Turner v. Giles*, 264 Ga. 812 (4) (___ SE2d ___) (1994), a recent Georgia Supreme Court case in which that Court held that a licensee denied a predeprivation hearing could not state a procedural due process claim as long as the state provided a postdeprivation hearing which resulted in the licensee's reinstatement with back pay. We are not bound by *Turner* because unlike the plaintiffs in *Henderson* and this case, the plaintiff in *Turner* really was reinstated as the result of the postdeprivation hearing provided by the state, rather than as the result of an order of the trial court in the § 1983 action. Moreover, to the extent *Turner* relies on *Parratt* to hold that a postdeprivation remedy may be adequate even if the plaintiff had a right to a predeprivation hearing, it may need to be reconsidered.

In *Parratt*, a prisoner's hobby materials were lost as a result of prison officials' negligence, and the United States Supreme Court held that this deprivation of property could not be the basis for a procedural due process claim because the state provided an adequate remedy for the loss through its state tort claims procedure. 451 U. S. at 544. The *Parratt* rule was extended to intentional but unauthorized acts in *Hudson v. Palmer*, 468 U. S. 517 (104 SC 3194, 82 LE2d 393) (1984), in which a prisoner alleged that a guard who did not like him intentionally destroyed property in his cell. In *Zinermon v. Burch*, 494 U. S. 113 (110 SC 975, 108 LE2d 100) (1990), however, the Supreme Court made it clear that the scope of the *Parratt* rule is limited to its underlying rationale. The actions causing

the deprivations in *Parratt* and *Hudson* were either random or unauthorized, and thus unpredictable from the perspective of the governmental entity. As a result, a predeprivation hearing was simply unfeasible and a postdeprivation hearing was all that could be expected or required. In this type of situation, the governmental entity meets the requirements of procedural due process if it provides for a postdeprivation hearing and remedy. But if the action causing the deprivation is planned and authorized, so that a predeprivation hearing is in fact feasible, a postdeprivation state remedy is *not* constitutionally sufficient. *Zinermon*, 494 U. S. at 115, 132, 136-138.[2] Based on *Zinermon*, therefore, it would appear that if a § 1983 plaintiff has a right to a predeprivation hearing and does not receive one, she states a valid procedural due process claim regardless of the postdeprivation remedies the state provides. See also *Fetner v. Roanoke*, 813 F2d 1183 (11th Cir. 1987) (postdeprivation remedies do not provide due process if predeprivation hearing is practicable).

For these reasons, we conclude that *at least* where it takes a § 1983 action to affect a postdeprivation remedy, a plaintiff with the right to a predeprivation hearing does not lose her § 1983 and § 1988 claims for damages and attorney fees once a postdeprivation remedy is effectuated. It follows that plaintiff may pursue her claims for damages and attorney fees. Indeed, the Board's behavior

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[2] Notably, although *Zinermon* was a five-to-four decision, the dissenters agreed with the majority that the scope of *Parratt* was limited in this manner; they simply disagreed on whether a predeprivation hearing was feasible under the facts presented.

in this case appears to be exactly the type of abuse of power the due process clause and 42 USCA § 1983 were meant to address.

As the record clearly shows a procedural due process violation in this case, summary judgment should be granted for plaintiff with respect to the Board's liability, and plaintiff is entitled to at least nominal damages and attorney fees. See *Carey v. Piphus*, 435 U. S. 247 (98 SC 1042, 55 LE2d 252) (1978); *Farrar v. Hobby*, 506 U. S. (113 SC 566, 121 LE2d 494) (1992). If plaintiff can prove other actual damages, she will be entitled to those;[3] and the jury may also award punitive damages if it finds either that the Board's conduct involved reckless or callous indifference to plaintiff's rights, or that it was motivated by evil motive or intent. See *Smith v. Wade*, 461 U. S. 30 (103 SC 1625, 75 LE2d 632) (1982).

Judgment reversed. McMurray, P. J., Birdsong, P. J., Blackburn and Smith, JJ., concur. Beasley, C . J., Andrews, Johnson, and Ruffin, JJ., concur in judgment only.

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[3] Plaintiff's compensatory damages may include damages for emotional or mental distress if proven. See *Carey*, 435 U. S. at 264.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ADRIENNE DOWLING, Plaintiff, v. ATLANTA CITY SCHOOL DISTRICT; JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D. F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, in Their Personal and Official Capacity; LESTER W. BUTTS, Superintendent, in his Personal and Official Capacity; and MYRTICE TAYLOR, Associate Superintendent for Instruction, in her Personal and Official Capacity, Defendants.	CIVIL ACTION FILE NO. E-4285 (Filed Apr. 1, 1994)

FINAL ORDER

The within and foregoing case having been called for trial on March 31, 1994, due and legal notice having been given to all parties, and it appearing to the Court that Plaintiff has been reinstated in her position by previous Order of this Court, and it further appearing to the Court that on March 30, 1994 this Court entered an Order establishing and awarding to Plaintiff all remaining back pay and benefits due her, and it further appearing to the

Court that Defendants have paid all back pay and benefits ordered to be paid to Plaintiff, and Defendants having moved this Court to dismiss Plaintiff's remaining claims for violation of procedural due process as moot under 42 U.S.C. § 1983 pursuant to the authority of *Henderson v. Sherrington*, 189 Ga. App. 498, 376 S.E.2d 397 (1988), and it appearing to the Court that this case is controlling and that Plaintiff has no remaining cause of action for damages for alleged violation of her procedural due process rights under 42 U.S.C. § 1983, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff recover nothing further from Defendants and that Plaintiff's remaining claims and all other claims of Plaintiff herein not previously adjudicated are hereby dismissed and judgment is rendered for Defendants on all remaining claims. This Order shall constitute a Final Order and Judgment in this action.

This 1st day of April, 1994.

ELIZABETH E. LONG, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

PREPARED BY:

/s/ Bruce H. Beerman
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ADRIENNE DOWLING, Plaintiff, v. ATLANTA CITY SCHOOL DISTRICT, ET AL., Defendants.	)	CIVIL ACTION FILE NO. E-04285 (Filed Aug. 16, 1993)

ORDER

The Court has considered the Plaintiff's Motion for Summary Judgment. The Court ruled on May 14, 1993, that it would entertain a renewed motion at the conclusion of an appeal to the State Board of Education ("State Board"). On July 9, 1993, the State Board rendered its decision. Based upon a thorough review of the file in this case, the Court makes the following findings of fact and conclusions of law:

1.

In July, 1986, the Atlanta City Board of Education ("City Board") hired the Plaintiff to be its Director of Telecommunications, a position that does not require certification as a teacher under Georgia law. In April, 1990, the City Board sent a letter to the Plaintiff acknowledging her tenure status. On April 13, 1992, the City Board informed the Plaintiff that her contract would not be renewed, but that the Plaintiff, as a tenured employee,

had rights under the Fair Dismissal Act (O.C.G.A. § 20-2-940), including the right to a pre-termination hearing.

2.

The Plaintiff requested the City Board to conduct a pre-termination hearing within the statutory period, but the City Board terminated the Plaintiff's employment on June 30, 1992, without a hearing. On August 20, 1992, this Court granted the Plaintiff's request for a temporary restraining order acknowledging the Plaintiff's property right to continued employment and requiring the City Board to conduct a hearing on the grounds for the Plaintiff's termination. Under this order, the Plaintiff was to receive pay until all the requirements of procedural due process were met.

3.

In October, 1992, a tribunal established by the Professional Practices Commission Tribunal ("PPC Tribunal"), specifically found that the Plaintiff had not violated any school policies, and that the situations found in the operation of two stations under her supervision were not caused by the Plaintiff's conduct. The PPC Tribunal recommended that the City Board reinstate the Plaintiff to her position. On November 9, 1992, the City Board voted not to renew the Plaintiff's contract.

4.

The Plaintiff appealed this decision to the State Board. After some procedural wrangling between the City Board and the Plaintiff, the State Board heard the appeal and rendered its decision on July 8, 1993. The State Board found that the Plaintiff, as a non-certificated employee, was not entitled to the protections of the Fair Dismissal Act as a matter of statutory law and that the State Board lacked jurisdiction to determine whether the Plaintiff was entitled to these protections as a matter of contract. The State Board also found that the Plaintiff could avail herself of the protections of O.C.G.A. § 20-2-1160. Under that statute, the State Board found that the City Board's decision not to renew the Plaintiff's contract was arbitrary and capricious in light of the PPC Tribunal's findings. The State Board reversed the decision of the City Board on this ground.

5.

This Court agrees with the State Board's conclusion that the Plaintiff is not entitled to the protections of the Fair Dismissal Act as a matter of statutory construction. However, "where no formal system of tenure exists, due process may be mandated nonetheless where state rules or understandings between the parties support a claim of entitlement to continued employment." *LaPier v. Holliman*, 514 F. Supp. 692 (N.D. Ga., 1980). It is clear from the City Board's letter recognizing her tenure status and its letter notifying the Plaintiff of the non-renewal of her contract, that all parties understood that the Plaintiff was entitled to continued employment.

6.

The contractual property right created by the City Board invokes procedural due process. Since the provisions of the Fair Dismissal Act describe the process afforded to a tenured employee whose contract will not be renewed, the Plaintiff was entitled to the protections of that Act.

IT IS THEREFORE ORDERED AND ADJUDGED that summary judgment be **GRANTED** to the Plaintiff on the issue of liability under the Fair Dismissal Act. A further evidentiary hearing is necessary on the issues of reinstatement and back pay (or front pay).

SO ORDERED this 12th day of August, 1993.

/s/ Elizabeth E. Long
Elizabeth E. Long, Judge
Superior Court of
Fulton County
Atlanta Judicial Circuit

cc: R. Mason Barge, Esq.
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